No. 83-1555

In The
SUPREME COURT of the UNITED STATES

October Term, 1983

HOOPA VALLEY TRIBE OF INDIANS,
Petitioner,

v.

JESSIE SHORT, et al.,
Respondents.

MOTION OF TIMBER RESOURCE TRIBES AND OTHER TRIBES FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER HOOPA VALLEY TRIBE OF INDIANS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AND

BRIEF OF AMICI CURIAE, TIMBER RESOURCE TRIBES AND OTHER TRIBES IN SUPPORT OF PETITIONER HOOPA VALLEY TRIBE OF INDIANS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IN SUPPORT OF REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 42.3 of the Rules of this Court, the above enumerated recognized Indian tribes respectfully move the Court for leave to file a brief as *Amici Curiae* in support of the Petition of the Hoopa Valley Tribe of Indians (No. 83-1555, filed by mailing on March 3, 1984) for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit. Consent for the filing of this brief was denied by Respondents.

INTEREST OF *AMICI CURIAE*

The *Amici* enumerated above are all federally recognized Indian tribes, most of whose reservations have commercial timber resources. Many of the reservations of these tribes have other commercial resources such as fish, hard minerals, oil and gas. The tribes depend on the sale of these resources to support the exercise of their powers of self-government as distinct, political entities.

Because the parties herein must concentrate their attention on the immediate facts and effects of the case on themselves, the *Amici* urge that they cannot adequately explicate the issues regarding the definition of "Indian Tribe" and the proper role of a recognized tribal governing body in the government-to-government relationship with the United States. Nor can they adequately present the issue of who legally qualifies as an Indian under older federal statutes giving Indians special benefits and services. While recognizing that a Motion for Leave to File an *Amicus Curiae* brief when consent has been refused is not favored, Sup.Ct. Rule 36.1, the *Amici* urge that the issues raised are of such magnitude to all federally recognized tribal governing bodies that the interests of the individual Respondents herein are transcended.

CONCLUSION

For the reasons set forth above, and in the interest of justice, the *Amici Curiae* respectfully request that the Court grant this motion.

RESPECTFULLY SUBMITTED,

DALE H. ITSCHNER
Attorney for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITY

Table of Cases

STATUTES AND REGULATIONS

OTHER AUTHORITY

BRIEF OF AMICI CURIAE, TIMBER RESOURCE TRIBES AND OTHER TRIBES IN SUPPORT OF PETITIONER HOOPA VALLEY TRIBE OF INDIANS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

I.

STATEMENT OF INTEREST OF AMICI CURIAE

The interest of *Amicus Curiae* is set out in the Motion for Leave to File, *supra*.

II.

THE QUESTION PRESENTED

Whether the terms "Indian" and "Tribe" have consistent, definite meanings when used in federal legislation enacted for the benefit of these undividuals or groups and the legislation itself does not define the terms.

III.

ARGUMENT

A. THIS COURT SHOULD GRANT THE WRIT SO AS TO RESOLVE DEFINITIVELY THE QUESTIONS WHAT IS A "TRIBE" AND WHAT IS AN "INDIAN" IN A LEGAL SENSE.

After approximately 150 years of use of the terms "Tribe" and "Indian" in federal statutes, it would seem reasonable that the definition of those terms in the statutes would be well settled. Apparently, not so; at least that is what the Court of Appeals below found in holding "The word 'tribe' (as related to Indians) has no fixed, precise or definite meaning . . ." The court went on to find that with respect to the Hoopa Valley Reservation the term "Tribe" included "Indians residing on one reservation." (Hoopa App. 7) While it extracted the language "Indians residing on one reservation" from the Indian Reorganization Act of 1934, 25 U.S.C. §479, as an appropriate definition of "tribe," the court then ignored the definition of "Indian" in §479; that definition requires: (a) membership in a recognized tribe; (b) a member's descendant who was a reservation resident on June 1, 1934; or (c) others of one-half or more Indian blood. Instead the court below created a new definition by adopting a standard of allotment, assignment or one-quarter Indian blood. (Hoopa App. 21, 22.)

Many earlier statutes, including 25 U.S.C. §407, use the terms "Tribe" and "Indian" without definition. In recent years, however, Congress has taken to defining these terms for purposes of particular Indian legislation, *see e.g.*, The Indian Child Welfare Act of 1978, 25 U.S.C. §1903, The Indian Self Determination and Educational Assistance Act of 1975, 25 U.S.C. §450b, and The Indian Civil Rights Act of 1968, 25 U.S.C. §1301. The common element in such definitions of "Tribe" is the factor of federal recognition–a tribe is an entity recognized as possessing powers of self-government, *see e.g.*,

25 U.S.C. §1301(1), or an Indian group recognized as being eligible for special programs and services because of their status, *see e.g.*, 25 U.S.C. §450b(b).

As more fully set forth below, it is *Amici's* position that to constitute an Indian tribe in the legal sense, an entity must, among other things, be recognized by the United States as a distinct political entity possessing powers of self government and eligibility for special programs and services. This position appears to coincide with present administration policy, as evidenced by the Federal Acknowledgment Project reflected in Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. §83. This process was adopted to give an historic tribal group with a common ethnological background of Indian ancestry, that has historically met the necessary criteria to constitute an Indian tribe, the opportunity to obtain recognition as a tribal governmental entity for purposes of gaining legal status as a tribe and thus eligibility for the various special services and benefits enjoyed by Indians. *See* 25 C.F.R. §83.3; Hoopa App. 154-55.

Also, as argued *infra*, it is the position of *Amici* that to be an "Indian" in a legal sense one must be a member of a federally recognized tribe. This membership requirement seems fairly constant in recent legislation, *see e.g.*, Indian Child Welfare Act of 1978, 25 U.S.C. §1903(3); Self Determination and Educational Assistance Act of 1974, 24 U.S.C. §450b(a); and Indian Financing Act of 1974, 25 U.S.C. §1452(b).

While in an ethnological sense, many of the Respondents may be classified as "Indians," nevertheless in the legal sense of eligibility for the special benefits and services accorded Indians, Respondents below do not qualify. Respondents had the opportunity to obtain federal recognition as a tribe, both in 1934, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §476, and more recently through regulations of the Department of the Interior specifically on behalf of the Yuroks of the Hoopa Valley Reservation, 25 C.F.R.§84 (1979). If Respondents are not willing to undertake the burdens of being Indians in the political and social sense, they should not now seek benefits solely on the basis of an accident of birth.

B. THE COURT OF APPEALS ERRS IN HOLDING THE TERMS "TRIBE" TO HAVE NO DEFINITE, FIXED MEANING WHEN USED IN 25 U.S.C. §407.

In its decision below, the Court of Appeals states: "[I]t is clear to us that Congress, when it used the term 'tribe' in this instance [referring to the adoption of 25 U.S.C. §407] meant only the general Indian groups communally concerned with the proceeds–not an officially organized or recognized Indian tribe–and that the qualified plaintiffs fall into the group intended by Congress." (Parenthetical added). The court further stated: "The word 'tribe' (as related to Indians) has no fixed, precise or definite meaning but can appropriately include 'Indians residing on one reservation.'" (Hoopa App. 7.) This holding jeopardizes contemporary Federal policy "fostering Tribal self government and economic development." *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 155 (1980).

Almost from the beginning of our republic, this Court has recognized Indian Tribes as distinct, political entities, *see e.g., Worcester v. Georgia*, 6 Pet. 515 (1832). Their unique status has been recognized by the Executive and Legislative branches of our government through the treaty-making process and numerous Acts of Congress.

In support of its position that the term "Tribe" has no fixed meaning, the Court of Appeals cites the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §461, *et seq.* First it should be noted that this statute was designed to reorganize separate groups of Indians into tribes with recognized tribal governing bodies. For example, The Confederated Tribes of Warm Springs Reservation, presently a single governmental entity, comprises what were historically separate bands and groups of Indians. Secondly, one of the major purposes of Section 16 of the Act, codified at 25 U.S.C. §476, was to give an Indian reservation an organized form of government that could be dealt with on a government-to-government basis by the United States. As history demonstrates, once a group of Indians formed a tribe and acquired federal recognition pur-

suant to the I.R.A. it became a tribe for all legal purposes and remains so.

An underlying premise for the operation of §476 was the notion that a "reorganized" tribe comprised only "Indians" and thus Congress found it necessary to define "Indian" in §479 as including members of recognized tribes, their decendents who are residing within the present boundaries of a Reservation and all other perons of one-half or more Indian blood. With this definition, Congress' scheme was complete.

As argued *infra*, to be an Indian in the legal sense at present requires membership in a recognized tribal entity. A prime sovereign power of an Indian tribe is the power to determine its own membership by its own law and to enforce that law in its own courts. The Supreme Court has recognized that subjecting tribal membership decisions to the scrutiny of a federal court forum undermines tribal court authority and infringes on the right of tribal self-government. Because Congress has left the sovereign tribal power of determining membership intact, the federal courts have no jurisdiction to intrude on tribal membership determinations. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). As the Supreme Court held in *Santa Clara*, regarding questions of membership, "Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." 436 U.S. at 72, n.32. In the instant case the holding of the court below essentially redetermines the membership of the Hoopa Valley Tribe and the Yurok Tribe or a newly-created unnamed tribe. None of these alternatives can be legally justified.

As recently as 1982, this Court, in concluding that an Indian tribe retained its sovereign power to tax non-members doing business on Reservation lands, strongly emphasized the traditional role of Indian tribes as sovereign governments providing "essential services" and "the advantages of a civilized society" inside their reservations. The Court also underscored the need for tribal revenues to carry out those essential governmental functions, *Merrion v. Jicarilla Apache Tribe*, 455 U.S.

310 (1982). If allowed to stand the decision below threatens the ability of recognized tribal governments to provide these essential services. Because of the vagaries of federal economic assistance to Indian tribes, the rents and profits of tribal property have been the only secure, self-sufficient financial base for tribal governments.

The Bureau of Indian Affairs, the agency charged with the administration of Indian matters and whose interpretation is entitled to "great weight" and not to be overturned unless clearly wrong, *United States v. Jackson*, 280 U.S. 183, 193 (1930), has consistently construed §407 to mean that unallotted timber funds are collected for the sole use of federally recognized tribal governments and their enrolled members. This construction is correct because it is founded upon the political relationship between the United States and Indian tribes as separate, distinct quasi-sovereigns spelled out by the decisions of this Court.

This Court has long recognized that determination of the existence of a tribe is a matter for the other branches of government. In *United States v. Holliday*, 3 Wall. 407 (1865), this Court held that federal liquor laws were applicable to a sale of liquor to a Michigan Chippewa Indian despite a treaty provision looking to the dissolution of the tribe for the reason that the Interior Department regarded the tribe as still existing. The Court declared:

> In reference to all matters of this kind, it is the rule of this court to follow the act of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. (3 Wall. at 419)

See also, United States v. Rickert, 188 U.S. 432 (1903); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876). The converse should also be true; legal existence of an Indian Tribe requires, among other things, recognition as such by the Interior Department.

The decisions of the Court of Appeals would also vitiate the United States' proper fulfillment of its trust responsibility

which requires allowing Indians greater control of their own destinities, *Morton v. Mancari*, 417 U.S. 535 (1974). Self-determination can only be accomplished through recognized tribal governing bodies. In *Morton*, this Court sustained the B.I.A.'s Indian hiring preference on the basis that it was not granted to a discrete racial group, but rather to Indians as members of quasi-sovereign tribal entities, 417 U.S. at 554. The Court of Appeals would now bestow special benefits on a purely racial basis without regard to the nexus of tribal membership, a bestowal which may not pass constitutional muster.

While the Court of Appeals goes to great lengths to state that its opinion is limited to the facts in the case before it, nothing prevents other claimants to tribal resources from employing the identical reasoning and effectively hamstringing tribal governments in the performance of their governmental functions through litigation. Federal courts have consistently held that, absent allotment, reservation property is tribal property in which individual Indians have no separate interest, *Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902); *Prairie Band of Patawotomi Indians v. Unites States*, 143 Ct. Cl. 131, 143 (1958) *cert. denied*, 359 U.S. 908 (1959). The decision as to how best to utilize the proceeds from the sale of tribal resources is a decision made in the first instance by recognized tribal governments in exercising "control of their own destinies" subject to the approval of the Secretary of the Interior as required by 25 U.S.C. §407.

While some tribes choose to make per capita distributions of timber proceeds, others, such as Navajo, do not. As a practical matter, the Court of Appeals' decision makes unworkable any approach which earmarks the money to fund tribal programs inasmuch as the Respondents below, or anyone similarly situated elsewhere, have no interest in tribal programs.

C. THE COURT OF APPEALS ERRS IN HOLDING THAT ONE MAY BE AN "INDIAN" AND THEREBY ELIGIBLE TO SHARE IN THE DISTRIBUTION OF RESERVATION RESOURCES WITHOUT BEING A MEMBER OF A FEDERALLY RECOGNIZED INDIAN TRIBE.

The Court of Appeals found that each so-called qualified plaintiff is entitled to recover his aliquot share of the proceeds from the sale of reservation timber, deciding that all such qualified Plaintiffs are "Indians of the Reservation." (Hoopa App. 7) *Amici* contend that the only proper way to determine who is an "Indian" is by the litmus test of tribal membership. As stated in the foremost treatise on Indian law, F. Cohen, *Handbook of Federal Indian Law* 2 (1942):

> The term "Indian" may be used in an ethnological or in a legal sense. Ethnologically, the Indian race may be distinguished from the Caucasian, Negro, Mongolian, and other races. If a person is three-fourths Caucasian and one-fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race. Yet legally such a person may be an Indian. From a legal standpoint, then, the biological question of race is generally pertinent, but not conclusive. Legal status depends not only upon biological, but also upon social factors such as the relation of the individual concerned to a white or Indian community . . . All these social or political factors may affect the classification of an individual as an "Indian" or a "non-Indian" for legal purposes, or for certain legal purposes.

It is the term "Indian" in the legal sense with which we are concerned. The social and political factors of which Cohen spoke in 1942 are today reflected in part by an individual's identifying himself as an Indian, but more significantly by an Indian tribe's acceptance of the individual as an Indian through tribal membership. The mere claim of Indian ancestry is not

enough to accord an individual the special benefits provided by the Federal Government to Indians. As stated in Getches, Rosenfeldt and Wilkinson, *Federal Indian Law* 6 (West 1979), in discussing the self-identification approach in census reports on total Indian population: "Finally, the self-identification approach permits persons to identify as Indians in those years when it is profitable, fashionable, or simply self-fulfilling to do so." The decision of the Court of Appeals below, if allowed to stand, creates the intolerable circumstance of permitting an individual to claim a share of tribal revenues derived from the sale of valuable reservation resources (and perhaps, from other sources) without assuming the corresponding obligation of tribal membership. Such a bizarre concept of rights without corresponding responsibilities is anathema to the entirety of the correlative concepts of "Tribe" and "Indian" embodied in the scheme of federal Indian law.

As demonstrated above, recent Federal legislation regarding Indians generally defines the term "Indian" as requiring tribal membership. In an earlier, simpler time it was relatively easy to determine who was an Indian in the social and legal sense, but with the passage of time and numerous Indian termination acts (e.g., 25 U.S.C. §§691, *et seq.*, regarding Western Oregon Indians), and because of intermarriage and other factors, the only valid test today is membership in a federally recognized tribe—not just when it seems profitable to claim to be an Indian.

With reference to Indian legislation, this Court has repeatedly emphasized that contemporary policies should guide the Federal Courts when interpreting federal statutes, regulations and executive orders, *e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 29, 55-56 (1978); *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976). Clearly contemporary policy requires that the term "Indian," when used in statutory construction, denote only an enrolled member of a federally recognized tribe.

While much is made in federal Indian law of the trust responsibility owed by the United States to Indians, it must not be overlooked that Indian tribal leaders also have a trust respon-

sibility to be faithful to their constituents, *see e.g., Seminole Nation v. United States*, 316 U.S. 286 (1942). Included in this responsibility is proper determination of membership and therefore eligibility for various federal and tribally provided services. Acceptance into tribal membership is also the best way to demonstrate the social acceptance factor stressed by Felix Cohen.

CONCLUSION

For the reasons set forth herein, the Writ of Certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

RESPECTFULLY SUBMITTED,

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